

## **FACSIMILE COVER PAGE**

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**To :** Renata B. Hesse

**From :** HARRY MESSENHEIMER

**Sent :** 1/25/02 at 8:33:16 PM

**Pages :** 3 (including Cover)

**Subject :**

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Comments on Microsoft Settlement

**Rio Grande Foundation**

P.O. Box 2015  
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[www.riograndefoundation.org](http://www.riograndefoundation.org)

January 25, 2002

Antitrust Division  
U.S. Department of Justice  
601 "D" Street N.W., Suite 1200  
Washington, D.C., 20530

Attn: Renata B. Hesse  
Subject: Comment on Proposed Final Judgment re **Microsoft**

Dear Sir or Madam:

I am writing to you on behalf of the **Rio Grande Foundation** of New Mexico, an independent, non-partisan policy research group dedicated to promoting free markets and open competition. I appreciate the opportunity to comment.

In my capacity as Senior Fellow for Economic Research at the Foundation, I urge you to accept the proposed settlement in the anti-trust case involving Microsoft. In urging you to accept the settlement my arguments are that (1) we do not know enough about possible harms to take more aggressive action against MS and (2) we should be careful about opening up antitrust law to unproductive, rent-seeking activity.

The proposed settlement is the one that likely will do the least harm. I say that with a good deal of humility, since I think many economists tend greatly to overstate what we really know of the possible harms alleged in this case. But one thing we do know is that competition is beneficial to society. Competition in an environment of economic freedom tends to promote human prosperity, an assertion strongly supported by recent empirical evidence.

What we don't know much about, however, is how the competitive process leads to prosperity. The economist's model of "perfect competition" is not particularly useful in informing us about antitrust law as it relates to possible harms that may reduce prosperity. Knowledge is not given; innovative change has been taking place at incredible speed. The premier scholar who wrote about competition and our lack of knowledge was Professor F. A. Hayek, who said in a famous essay about competitive process<sup>1</sup>: "...we should worry much less about whether competition is perfect and worry much more about whether there is competition at all." Undoubtedly some of MS's restrictions on access to Windows were only intended to increase its market share while raising cost barriers to potential entrants. But it is hard to differentiate those restrictions from actions that substantially benefit consumers, as

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<sup>1</sup> Hayek, F.A., "The meaning of competition," in *Individualism and Economic Order*, Univ. of Chicago Press 1948, Midway reprint 1980, p. 105.

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some of the alleged predatory behavior on the part of MS would appear to do. It is not readily apparent, for example, that the tying of Internet Explorer to the Windows desktop is anything but a benefit to those who purchase Windows. The issue boils down to whether or not this tying will result in differential harm to consumers over time. The only way that could happen is if the barriers to entry were so substantial and the resulting MS monopoly so inefficient as to erode away this short-run benefit. But those barriers actually seem to be quite small. Any time I surf the Internet I am amazed at how much competition there is. And how can we tell if MS is more or less efficient now than an unseen evolution under a different set of antitrust doctrine in which MS has a court-dictated constraint on behavior to reduce its market share? Market share as a measure of harm seems to be a red herring. The threat of entry, itself, tends to promote expanded service and lower costs. I think what we have observed over the past 40 years at least partially justifies my assertion.

As mentioned above, my second argument involves the unproductive cost of seeking differential advantage over competitors through the government in general and antitrust law in particular. In economics this is known as "rent-seeking" behavior. Economists are in wide agreement that rent-seeking is a loss to the economy. Rather than seeking differential advantage from the government, firms could be using those resources to produce a better product at lower cost. The costs of rent-seeking behavior in this case alone seem to be enormous. And the draconian ruling by Judge Jackson would appear to open the door for like kind of wasteful activity. It would lead to severe impacts far beyond one company, acting as a drag on one of the most vibrant sectors of our economy. We can do nothing about the resources already used in this case, but we can prevent this kind of wasteful activity in the future.

That is why the settlement should be approved. It is a common-sense solution that recognizes the limitations in what we know about competition and innovation. And its approval also would serve to reduce predatory, rent-seeking behavior in the future.

Thank you for your consideration.

Sincerely,



Harry Messenheimer, Ph.D.  
Senior Fellow, Rio Grande Foundation